IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 130 of 1996

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JAYVANTLAL ALIAS JEVATLAL

Versus

SANGHAVI DHIRAJLAL JAYVANTLAL

Appearance:

MR SURESH M SHAH for Appellant

MR BD KARIA for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 17/01/97

ORAL JUDGEMENT

1. Heard the learned counsel for the respective parties. The present Second Appeal under section 100, CPC is filed by original defendant no.2 wherein the present respondents are the original plaintiffs.

2. The original plaintiffs being four in number, had filed a suit against two defendants for a decree of declaration that they have a right of way over a strip of land appurtenant to the house of the defendants, and for consequential permanent prohibitory injunction

restraining the defendants from interfering with the assertion and exercise of this right on the part of the plaintiffs. The trial court dismissed the suit.

3. The plaintiffs, therefore, preferred an appeal under section 96, CPC. It is pertinent to note at this stage that the appeal was preferred by all the four plaintiffs as appellants, and both the defendants of the suit were joined as respondents in the said appeal. However, during the pendency of the appeal, and before the same was decided, plaintiff no.4 and defendant no.1, both expired. It is common ground that the heirs and legal representatives of neither of these parties were brought on the record of the appeal.

4. The lower appellate court, after hearing the surviving parties viz. the three appellants (in appeal) and the sole respondent (in appeal), reversed the judgement and decree of the trial court, set aside the dismissal of the suit, and passed a decree as prayed for in favour of the three appellants and against the sole respondent.

5. Being aggrieved by the said decree passed by the lower appellate court, this appeal has been preferred by the original defendant no.2, against the three original plaintiffs.

6. It is sought to be contended in the present appeal that the lower appellate court was passing a decree for the first time, by setting aside the dismissal of the suit by the trial court, and was, therefore, creating and declaring a right in favour of the three surviving plaintiffs. This situation creates an anomaly inasmuch as the declaration and consequential relief sought by the deceased plaintiff no.4 had been rejected by the trial court and has been granted by the lower appellate court. It is therefore submitted that, under the circumstances, the lower appellate court could not have passed a decree for the first time in favour of the three surviving plaintiffs,leaving the dismissal of the suit as regards the fourth plaintiff untouched.

6.1 It is also contended along similar lines in respect of the death of the first defendant during the pendency of the appeal. In this context it is submitted that the decree passed by the lower appellate court for the first time is only as against the surviving defendant no.2, and would not bind the original defendant no.1 since his heirs have not been brought on record. Under the circumstances the second defendant would be bound by

the decree, as also the heirs of such second defendant, whereas the heirs of the first defendant, if any, would not be so bound by the decree.

6.2 By submissions made along the aforesaid lines, it was urged by the learned counsel for the appellant that this court ought not to countenance decrees where such an anomaly is created (out of necessity), and under the circumstances, the lower appellate court could not have passed any decree whatsoever, and that therefore the decree of the lower appellate court is a nullity.

7. These submissions are clearly hypothetical in nature, and even otherwise the same are not sustainable.

8. Order 22, Rules 2, 3 and 4, CPC, contemplate a situation where the plaintiff or a defendant to a suit expires, and the right to sue survives. It may be noted here that there is no controversy that on the death of the 4th plaintiff, the right to sue did survive in respect of plaintiff nos.1, 2 and 3. Similarly, on the death of the first defendant during the pendency of the appeal, the surviving plaintiffs (as appellants in appeal) could certainly continue the appeal as against the surviving respondent (original defendant no.2), inasmuch as the rights asserted as against both the original defendants were asserted in respect of the property held by the two defendants jointly. Needless to say, the provisions of Order 22 would also apply, mutatis mutandis, to appeals by virtue of the provisions of Order 41, CPC.

9. I may also mention here that the aforesaid contentions raised in respect of the death of plaintiff no.4 and defendant no.1 during the pendency of the appeal before the lower appellate court were not raised before the lower appellate court. Strictly speaking, I need not have considered the said contentions in the present appeal since they are raised for the first time herein, and do not pertain to any fundamental or jurisdictional aspect.

10. The learned counsel for the appellant also sought to contend that the decree passed in favour of the plaintiffs was based on a plea of an easement of necessity, which necessarily would stand extinguished, the moment the plaintiffs acquire an alternate way. This contention is not justified on the facts and circumstances of the case.

11. Having examined the plaint and the written

statement with the assistance of the learned counsel for the respective parties, I have no hesitation in holding that what the plaintiffs specifically pleaded in the plaint, as also established by appropriate evidence, was a legal right to pass over the properties of the defendants, which right accrued to them by way of easement of necessity as well as by easement by prescription. These are findings of fact based on a rational and reasonable appreciation of evidence on record, and thus cannot be interfered with.

12. So far as the appreciation of evidence is concerned, no substantial question can be raised on this account, and even if so raised, the same would not be entertainable in the present appeal under section 100, CPC. The lower appellate court, after having appreciated the evidence on record, has come to a definite finding of fact that the plaintiffs have succeeded in proving an easement by prescription, since they have been using the asserted route or way over the land of the defendants for about 25 years, ever since they entered into the dominant heritage by way of tenants in the said property. It was quite some time thereafter that the plaintiffs purchased the said property from the landlord and became owners thereof. It was only after becoming owners that they opened another door for the first time on the other side of the said property, and it was only by opening such a door that an alternate way was acquired by them. Even if the evidence is appreciated in a manner most favourable to the appellants, it could only mean that an easement of necessity might have been lost on the plaintiffs opening a new door as aforesaid, which, however, did not extinguish the easement by prescription. The lower appellate court has definitely recorded a finding of fact that the plaintiffs have succeeded in establishing by appropriate material on record, that they have continued to use this passage over the defendants' property for a period longer than the minimum period prescribed by the law of Easement (for more than 20 years).

13. In the premises aforesaid, no substantial question of law arises in the present appeal and the same is, therefore, dismissed. Notice is discharged with no order as to costs.

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